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**COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD**

IN RE: ACCOUNT OF MICHAEL J. SPINKA
DOCKET NO. 2015-03
CLAIM OF MICHAEL J. SPINKA

OPINION AND ORDER OF THE BOARD

The Board has carefully and independently reviewed the entire record of this proceeding, including the Briefs and the Hearing Examiner's proposed Opinion and Recommendation. No exceptions to the proposed Opinion and Recommendation were filed.

The Board finds appropriate the Hearing Examiner's History, Findings of Fact, Conclusions of Law, Discussion, and Recommendation, and we hereby adopt them as our own, and accordingly:

IT IS HEREBY ORDERED that Claimant's request to elect Class T-D membership after the statutory deadline of December 31, 2001, is DENIED.

PUBLIC SCHOOL EMPLOYEES'
RETIREMENT BOARD

Dated: May 25, 2016

By: Melva S. Vogler
Melva S. Vogler, Chairman

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PSERS
EXECUTIVE OFFICE

**COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM**

Re: Account of Michael J. Spinka : Docket No. 2015-03
Claim of Michael J. Spinka :

OPINION AND RECOMMENDATION

Date of Hearing: November 4, 2015
Hearing Officer: Marc A. Moyer, Esquire
Claimant (*Pro Se*): Michael J. Spinka
For PSERS: Jennifer A. Mills, Esquire

HISTORY

This matter is before the Public School Employees' Retirement Board on appeal filed by Michael J. Spinka ("Claimant") from a November 19, 2014 determination by the Executive Staff Review Committee ("ESRC") of the Public School Employees' Retirement System ("PSERS") that denied Claimant's request to change his PSERS membership from Class T-C to Class T-D. By way of background, Claimant requested to retroactively elect Class T-D membership by letter dated October 9, 2013, after purportedly learning that he had been "defaulted to a 2.0 retirement multiplier" upon being hired by Boyertown Area High School in 2001. Claimant asserted that until the time of having learned of his T-C membership status, he believed he was "paying into a 2.5 retirement multiplier." By letter dated November 19, 2013, PSERS responded to Claimant's inquiry by denying his request to elect Class T-D membership based upon his failure to complete and timely return an Act-9 election ballot which had been mailed to his address of record on file with PSERS in 2001.

Claimant, thereafter, appealed from PSERS' November 19, 2013 decision to the ESRC on December 13, 2013, through which he asserted, in part, that he did not receive the Act-9 election ballot or other PSERS notices. Claimant later supplemented his appeal by letter September 30, 2014 through which he asserted that he did not reside at the address on file with PSERS at the time PSERS sent the Act-9 election ballot and notices to him at his address. By correspondence dated January 7, 2015, the ESRC notified Claimant of its decision to deny his request on the ground that he had failed to complete and return an *Act 2001-9 PSERS Membership Class Election Form* to PSERS prior to the December 31, 2001 statutorily prescribed deadline for electing Class T-D membership despite having been provided the Form and the notices which informed him that he would remain a Class T-C member in the event he did not submit the *Election Form* by December 31, 2001.

Claimant timely appealed from the ESRC's determination on January 30, 2015, and requested an administrative hearing. PSERS filed an Answer on February 19, 2015. A formal administrative hearing was, thereafter, held on November 4, 2015, before Hearing Officer Marc A. Moyer, Esquire.

Claimant participated in the hearing, *pro se*, and testified on his own behalf. PSERS presented its case through the testimony of PSERS Retirement Administrators, Margaret Buller and Troy W. Peechatka. PSERS offered twenty-seven (27) Exhibits which were admitted into the record. By Order dated November 20, 2015, Claimant was provided until December 23, 2015 to file his Post-Hearing Brief. The Order provided PSERS until January 25, 2016 to file its Post-Hearing Brief and provided Claimant until February 12, 2016 to file a Reply-Brief. Notes of Testimony ("N.T.") were filed on November 18, 2015, and the record closed with the filing of the parties' Post-Hearing Briefs. This matter is now before the Board for final disposition.

FINDINGS OF FACT

1. Claimant first became a member of PSERS on March 14, 2001 pursuant to his employment with the Boyertown Area School District. (PSERS-6; PSERS-8; N.T. 40-41, 70).
2. At the time of his enrollment as a PSERS member, Claimant provided his employer and PSERS with a mailing address of [REDACTED] (PSERS-6; PSERS-7; N.T. 41, 54, 70-71).
3. At the time of his enrollment, Claimant resided with his parents at [REDACTED] [REDACTED] which Claimant described as his "only, correct, legit address at that time." (N.T. 71-73).
4. Claimant's parents requested that he move from the [REDACTED] [REDACTED] address. However, Claimant was unable to recall the date upon which he moved from the residence. (N.T. 71-72, 75-76).

5. Claimant's only address on file with PSERS from March 14, 2001 through September 9, 2004 was [REDACTED] (PSERS-22; N.T. 54-55, 75).
6. Act 2001-9, Act of May 17, 2001, P.L. 26, No. 9 ("Act-9"), became effective on July 1, 2001, and permitted PSERS members the opportunity to elect a new, optional Class T-D membership which, in part, entailed calculating retirement benefits using a 2.5 % multiplier and permitted active PSERS members to elect multiple service membership. (24 Pa.C.S.A. § 8305.1(a); PSERS-3; PSERS-5).
7. Prior to July 1, 2001, PSERS members were classified as Class T-C members, under which retirement benefits were calculated with at 2.0% multiplier. (24 Pa.C.S.A. § 8305.1(a); 24 P.S. § 8305(a); PSERS-3; PSERS-5).
8. Act 9 provided, in pertinent part, as follows: "The member must elect to become a Class T-D member by filing a written notice with the board on or before December 31, 2001, or before the termination of school service or State service as applicable, whichever first occurs." (24 Pa.C.S.A. § 8305.1(b)).
9. Act 9 provided, in pertinent part, as follows: "If the member fails to timely file an election to become a Class T-D member, then all of the member's Class T-C school service shall be credited as Class T-C service, and said service shall not be eligible for Class T-D service credit upon termination of service and subsequent employment as an active member." (24 Pa.C.S.A. § 8305.1(d)).
10. Claimant's employer first reported Claimant to PSERS in October, 2001. (PSERS-2; PSERS-6; PSERS-8; N.T. 20-21, 25).
11. By letter dated October 22, 2001, mailed to Claimant at his address on file with PSERS, Claimant was informed that his employer had provided PSERS with an Enrollment Application on his behalf. The correspondence stated, in pertinent part, as follows:

Since you entered school service prior to July 1, 2001, your membership class is T-C and you have the option to change your membership to T-D. Changing your

PSERS Membership Class is optional. To become a member of the Class T-D, you must elect to do so in writing.

In the near future, you will be sent a *PSERS Membership Class Election Form*, postage-paid return envelope and a letter of explanation regarding the terms of Act 9 of May 17, 2001 which permits the election of the new Class T-D membership....

(PSERS-2; PSERS-8; N.T. 43-46).

12. Claimant was mailed correspondence in October, 2001 which provided details about Class T-D membership and informed Claimant of his need to complete an enclosed *Act 2001-9 PSERS Membership Class Election Form* and return the form to PSERS no later than December 31, 2001 if he desired to elect Class T-D membership. The correspondence further advised Claimant, in part, that his failure to return the completed form to PSERS could result in his “**permanent forfeiture**” of his ability to elect Class T-D membership. (PSERS-1; PSERS-3; N.T. 20, 23-25).

13. Claimant was mailed correspondence on December 5, 2001 entitled “Final Notice” as part of a mailing to PSERS members who had not yet filed for Class T-D service. The purpose of the mailing was to remind Claimant of his need to provide PSERS with a *Membership Class Election Form* no later than December 31, 2001, if he intended to change to Class T-D. (PSERS-1; PSERS-4; PSERS-5; N.T. 26-27).

14. PSERS would have been informed of any notices sent to Claimant through third-party vendor, election.com, which were returned as being undeliverable or returned for having an incorrect address. (N.T. 17, 60-61).

15. PSERS mailed Claimant each of the *Statements of Account* to Claimant’s addresses on file with PSERS, beginning November 28, 2002. Each *Statement* correctly identified Claimant’s years of service, Service Class T-C, contributions and interest earned, and his contribution rate. (PSERS-9 through PSERS-21; N.T. 22, 27, 46-50).

16. The Principal Beneficiaries identified on each of the *Statements of Account* contained the correct first name of the beneficiaries identified by Claimant on the *Nomination of Beneficiaries* Form he submitted to PSERS. The *Statements of Account* also contained Claimant's correct name and address, but misspelled the last name of the Principal Beneficiaries by a single letter. (PSERS 9 through PSERS 21; N.T. 42, 68, 71).¹

17. None of the Act 9, T-D membership notices mailed to Claimant at his address at [REDACTED] [REDACTED] were returned to PSERS as being undelivered or undeliverable. (N.T. 60-61).

18. Claimant continued to reside at [REDACTED] in October, 2001. (N.T. 76).

19. Claimant's father is not a PSERS member. (N.T. 73).

20. Claimant's parents continued to live at [REDACTED] in October, 2001, and after Claimant had moved from the residence. (N.T. 71-73).

21. Claimant periodically returned to the [REDACTED] address to check the mail delivered to him at that address. (N.T. 73-75).

22. Claimant occasionally had mail waiting for him upon his arrival to the [REDACTED] [REDACTED] address. (N.T. 75).

23. Claimant requested to retroactively elect Class T-D membership for the first time by letter dated October 9, 2013, after he purportedly learned that he had been "defaulted to a 2.0 retirement multiplier" upon being hired by Boyertown Area High School in 2001. (PSERS-23; N.T. 55-56).

¹ Claimant's *Nomination of Beneficiaries* Form was handwritten and plausibly set forth the spelling of Mike and Ginger Spinka as Mike and Ginger "Spinica" in that the handwritten "k" in their last names was separated by a space. (PSERS-7; N.T. 41-42).

24. Claimant asserted through his October 9, 2013 correspondence that until the time of having learned of his T-C membership status, he believed he was “paying into a 2.5 retirement multiplier.” (PSERS-23).
25. By letter dated November 19, 2013, PSERS responded to Claimant’s inquiry by denying his request to elect Class T-D membership based upon his failure to complete and timely return an Act-9 election ballot which had been mailed to his address of record on file with PSERS in 2001. (PSERS-24; N.T. 56-57).
26. Claimant appealed from PSERS’ November 19, 2013 decision to the ESRC on December 13, 2013, through which he asserted, in part, that he did not receive the Act-9 election ballot or other PSERS notices. (PSERS-25; N.T. 57).
27. Claimant later supplemented his appeal by letter on October 17, 2014 through which he asserted that he did not reside at the address on file with PSERS at the time the Act-9 election ballot and notices were sent to that address by PSERS. (PSERS-26; N.T. 58).
28. By correspondence dated January 7, 2015, the ESRC notified Claimant of its decision to deny his request for T-D membership on the ground that he had failed to complete and return an *Act 2001-9 PSERS Membership Class Election Form* to PSERS prior to the December 31, 2001 statutorily prescribed deadline for electing Class T-D membership despite having been provided the Form and notices that he would remain a Class T-C member in the event he did not submit the *Election Form* by December 31, 2001. (PSERS-27; N.T. 59).
29. Claimant was notified of his right to appeal the ESRC’s decision to the Board. (PSERS-27).
30. Claimant timely appealed from the ESRC’s determination on January 30, 2015, and requested an administrative hearing. (Official Notice-PSERS’s Records).²

² Official notice of such matters as might be judicially noticed by courts is permissible under the General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.1 *et. seq.*, at §35.173, which provides, in pertinent part, as follows:

31. PSERS filed an Answer on February 19, 2015. (Official Notice-PSERS's Records).
32. Claimant was served with all notices, pleadings, orders, and motions of record in this matter, and he attended the hearing on November 4, 2015. (Official Notice-PSERS's Records; PSERS-1 through 27; N.T. 4-83).

CONCLUSIONS OF LAW

1. Claimant has the burden of proof in this proceeding. *Wingert v. State Employees' Retirement Board*, 589 A.2d 269, 271 (Pa. Cmwlth. 1991).
2. PSERS derives its authority solely from the provisions of the Pennsylvania Public School Employees' Retirement Code, 24 Pa.C.S.A. §§8101 *et. seq.* ("Retirement Code").
3. The authority of the Public School Employees' Retirement Board to grant or deny Claimant's request to retroactively elect Class T-D membership is limited to the provisions of the Retirement Code; and the Board has no authority to grant rights beyond those specifically set forth in the Retirement Code or to enlarge the statutorily mandated election period. *Burriss v. State Employees' Retirement Board*, 745

§35.173. Official notice of facts.

Official notice may be taken by the agency head or the presiding officer of such matters as might be judicially noticed by the courts of this Commonwealth, or any matters as to which the agency by reason of its functions is an expert. . . .

1 Pa. Code §35.173.

Official notice is also permitted under case law. *See, for example, Falasco v. Commonwealth of Pennsylvania Board of Probation and Parole*, 521 A. 2d 991 (Pa. Commonwealth Ct. 1987), in which the Commonwealth Court explained:

"Official notice" is the administrative counterpart of judicial notice and is the most significant exception to the exclusiveness of the record principle. The doctrine allows an agency to take official notice of facts which are obvious and notorious to an expert in the agency's field and those facts contained in reports and records in the agency's files, in addition to those facts which are obvious and notorious to the average person. Thus, official notice is a broader doctrine than is judicial notice and recognizes the special competence of the administrative agency in its particular field and also recognizes that the agency is a storehouse of information on that field consisting of reports, case files, statistics and other data relevant to its work.

521 A. 2d at 994 n. 6

A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992).

4. Claimant was correctly determined to be a Class T-C member because he was hired prior to July 1, 2001. (Finding of Fact, No. 1; 24 Pa.C.S.A. § 8305(a)).

5. Claimant had until December 31, 2001 to elect Class T-D membership. (24 Pa.C.S.A. § 8305.1(b)).

6. PSERS provided Claimant sufficient notice of his ability to Elect Class T-D membership by mailing Claimant written correspondence containing such notices to his place of residence on file with PSERS, 1401 Hirsch Street, Temple, Pennsylvania 19560. (Findings of Fact, Nos. 11-13, 18, 21-22; *Higgins v. Public School Employes' Retirement System*, 736 A.2d 745 (Pa. Cmwlth. 1999); *Tyson v. Public School Employes' Retirement System*, 737 A.2d 325 (Pa. Cmwlth. 1999); *Milford Township Board of Supervisors v. Department of Environmental Resources*, 644 A.2d 217 (Pa. Cmwlth. 1994); *Chartiers Industrial and Commercial Development Authority v. Allegheny County Board of Property Assessment*, 645 A.2d 944 (Pa. Cmwlth. 1994); *Department of Transportation v. Brayman Construction Corporation*, 513 A.2d 562 (Pa. Cmwlth. 1986)).

7. Claimant has failed to satisfy his burden of establishing that PSERS did not provide him with notice of his ability to Elect Class T-D membership by mailing Claimant written correspondence containing such notices when it mailed the notices to his place of residence on file with PSERS, [REDACTED] [REDACTED] (Findings of Fact, Nos. 11-13, 18, 21-22; *Higgins v. Public School Employes' Retirement System*, 736 A.2d 745 (Pa.Cmwlth. 1999); *Tyson v. Public School Employes' Retirement System*, 737 A.2d 325 (Pa.Cmwlth. 1999); *Milford Township Board of Supervisors v. Department of Environmental Resources*, 644 A.2d 217 (Pa.Cmwlth. 1994); *Chartiers Industrial and Commercial Development Authority v. Allegheny County Board of Property Assessment*,

645 A.2d 944 (Pa. Cmwlth. 1994); *Department of Transportation v. Brayman Construction Corporation*, 513 A.2d 562 (Pa. Cmwlth. 1986)).

8. Claimant is not entitled to Class T-D membership because he did not file his request for Class T-D membership on or before December 31, 2001. (Finding of Fact, No. 23; 24 Pa.C.S.A. § 8305.1(b)).

9. The Board is precluded from retroactively granting Claimant Class T-D membership because Claimant did not file his request for such membership by December 31, 2001. *Forman v. Public School Employees' Retirement Board*, 778 A.2d 778 (Pa. Cmwlth. 2001); *Burris v. State Employees' Retirement Board*, 745 A.2d 704, 706 (Pa. Cmwlth. 2000); *Bittenbender v. State Employees' Retirement Board*, 622 A.2d 403 (Pa. Cmwlth. 1992).

10. Claimant was served with all pleadings, Orders and Notices filed of record in this matter, and participated in the hearing with the assistance of legal counsel. (Official Notice-Board records; Finding of Fact, No. 32).

DISCUSSION

This matter involves an appeal from a November 19, 2014 decision by the PSERS' Executive Staff Review Committee to deny Claimant's request that he be permitted to retroactively elect Class T-D membership. Claimant does not dispute that he did not submit a request for Class T-D membership prior to December 31, 2001. Instead, Claimant asserts that he should now be permitted to become a Class T-D member because he was not provided notice of the requirement that he elect Class T-D membership by December 31, 2001, or forfeit the opportunity to later choose that classification.

As the party appealing from the determination of the PSERS Executive Review Committee decision, Claimant bears the burden of establishing that he is entitled to the retirement benefit classification he seeks under the Retirement Code, 24 Pa.C.S.A. § 8101 *et. seq.* See, *Gierschick v. State Employees' Retirement Board*, 733 A.2d 29, 32 (Pa. Cmwlth. 1999); *Wingert v. State Employees'*

Retirement Board, 589 A.2d 269, 271 (Pa. Cmwlth. 1991). The degree of proof required to establish a case before an administrative tribunal is a preponderance of the evidence. *Lansberry v. Pennsylvania Public Utility Commission*, 578 A. 2d 600, 602 (Pa. Cmwlth. 1990), *app. den.*, 602 A. 2d 863 (Pa. 1992); *Suber v. Pennsylvania Commission on Crime and Delinquency*, 885 A. 2d 678, 681-82 (Pa. Cmwlth. 2005). A preponderance of the evidence is "such proof as leads the fact-finder. . . to find that the existence of a contested fact is more probable than its nonexistence." *Sigafoos v. Pennsylvania Board of Probation and Parole*, 503 A. 2d 1076, 1079 (Pa.Cmwlth. 1986); *A.B. v. Slippery Rock Area School District*, 906 A. 2d 674 (Pa.Cmwlth. 2006). Claimant must, therefore, satisfy his burden of proof with evidence that is substantial and legally credible, not with mere "suspicion" or by only a "scintilla" of evidence. *Lansberry, supra*.

Statutory/Regulatory Framework

It is well established that a retiree's right to benefits under the Retirement Code is strictly limited to those specifically set forth by the Code. *See, Forman*, 778 A.2d 780 (Pa. Cmwlth. 2001); *Burris*, 745 at 706; *Bittenbender, supra*. Moreover, PSERS is required to construe its enabling statute according to its plain meaning and in such a manner as to give effect to all of its provisions. 1 Pa.C.S.A. § 1921(a),(b). Pertinent to Claimant's claim, the Retirement Code provides as follows:

§8305.1. Election to become a Class T-D member

(a) **General rule.** - - A person who is:

- (1) a member of the system; or
- (2) a multiple service member . . . and who, on the effective date of this subsection, is eligible for Class T-D membership may elect to become a member of Class T-D.

(b) **Time for making election** - - The member **must elect to become a Class T-D member by filing a written notice with the board on or before December 31, 2001**, or before the termination of school service or State service as applicable, whichever first occurs.

(d) Effect of failure to make election. - -If the member fails to timely file an election to become a Class T-D member, then all of the member's Class T-C school service shall be credited as Class T-C service, and said service shall not be eligible for Class T-D service credit upon termination of service and subsequent employment as an active member.

24 Pa.C.S.A. §8305.1(a), (b), and (d) (emphasis added). In turn, the Retirement Code at 24 Pa.C.S.A. § 8305 provides, in pertinent part, as follows:

§ 8305. Classes of service

(a) Class T-C membership.--A school employee who is a member of Class T-C on the effective date of this part or who becomes a member of the system subsequent to the effective date of this part shall be classified as a Class T-C member, provided the school employee does not become a member of Class T-D pursuant to subsection (c).

(c) Class T-D membership.--

(1) A person who becomes a school employee and an active member, or a person who becomes a multiple service member who is a State employee and a member of the State Employees' Retirement System, on or after the effective date of this subsection shall be classified as a Class T-D member upon payment of regular member contributions. Any prior school service credited as Class T-C service shall be credited as Class T-D service, subject to the limitations contained in paragraph (4)....

The record in this matter unequivocally establishes that Claimant was a member of Class T-C upon initially becoming a PSERS member. Accordingly, the provisions of the Retirement Code are very clear as they pertain to the election of Class T-D membership. The time for making the election to become a Class T-D member was on or before December 31, 2001, or before the termination of school service or State service, as applicable, whichever occurred first. Moreover, the method for making the election was "by filing a written notice with the board." 24 Pa. C.S.A. §8305.1(b).

Analysis-Denial of T-D Service Election

The salient issue before the Board is whether Claimant filed a written election for Class T-D membership with the Board on or before December 31, 2001. The evidence is clear that Claimant did not. The Act contains no exceptions to its requirements and "PSERB has no authority to grant rights

beyond those specifically set forth in the retirement code.” *Forman*, 778 at 780 (citing *Hughes v. Public School Employees’ Retirement Board*, 662 A.2d 701 (Pa. Cmwlth. 1995), *app. den.*, 668 A.2d 1139 (Pa. 1995)). The record in this case shows that in response to the 2001 amendments to the Retirement Code, PSERS undertook extensive efforts to notify its existing members and relatively new members, including Claimant, of the 2001 changes to the Retirement Code and corresponding need to elect Class T-D membership prior to December 31, 2001. (N.T. 14-20; PSERS-1). Specifically, PSERS sent a notice of the Act 9 elections to all eligible members on June 6, 2001. (N.T. 20; PSERS-1). PSERS, thereafter, sent a second round of notices in October, 2001 to all eligible members who had not been previously provided with the earlier mailings. (N.T. 20, 23-25; PSERS-1; PSERS-2; PSERS-3; PSERS-6; PSERS-8).

The record further demonstrates that because Claimant had not been reported to PSERS by Boyertown Area School District prior to October, 2001, Claimant was mailed the notice on or about October 22, 2001. (N.T. 20, 23-25; PSERS-1; PSERS-2; PSERS-3; PSERS-6; PSERS-8). The letter mailed to Claimant dated October 22, 2001 advised Claimant, in pertinent part, as follows:

Since you entered school service prior to July 1, 2001, your membership class is T-C and you have the option to change your membership to T-D. Changing your PSERS Membership Class is optional. To become a member of the Class T-D, you must elect to do so in writing.

In the near future, you will be sent a *PSERS Membership Class Election Form*, postage-paid return envelope and a letter of explanation regarding the terms of Act 9 of May 17, 2001 which permits the election of the new Class T-D membership....

(PSERS-2; PSERS-8; N.T. 43-46). PSERS additionally mailed Claimant correspondence in October, 2001 which provided details about Class T-D membership and informed Claimant of his need to complete the enclosed *Act 2001-9 PSERS Membership Class Election Form* and return the Form to PSERS no later than December 31, 2001 if he desired to elect Class T-D membership. The

correspondence further advised Claimant, in part, that his failure to return the completed form to PSERS could result in his “**permanent forfeiture**” of his ability to elect Class T-D membership. (PSERS-1; PSERS-3; N.T. 20, 23-25). In particular, the correspondence stated as follows:

Membership Class

The Membership Class determines your percentage (multiplier) in calculating your future retirement benefit. Act 9 creates a new (T-D) class which increases the multiplier used to calculate the basic retirement benefit from 2.0% to 2.5% for school and intervening military service...

The Membership Class also determines your contribution rate. Most members are currently in the Class T-C. Class T-C members enrolled prior to July 22, 1983, have an employee contribution rate of 5.25%, and members enrolled on or after July 22, 1983, have an employee contribution rate of 6.25%. If you elect Class T-D membership and you currently contribute at 5.25%, your contribution rate will increase to 6.5%. If you elect Class T-D membership and you currently contribute at 6.25%, your contribution rate will increase to 7.5%.

Changing your PSERS Membership Class is optional. To become a member of the Class T-D, you must *elect* to do so. **If you elect not to change your membership class or you do not return your election form to PSERS, you will remain a member of Class T-C.** Your retirement benefit calculation percentage will remain at 2% and you will retain your current contribution rate. **You will not have the opportunity to convert to Class T-D for your prior service again.**

To make your election, **complete the enclosed election form and return it to PSERS prior to your date of termination from school or state service or by December 31, 2001, whichever is earlier.** We do, however, encourage you to submit your *PSERS Membership Form* immediately.

(PSERS-3). As set forth in the correspondence, a *PSERS Membership Class Election Form* was included in the correspondence. *Id.*

Claimant was mailed additional correspondence on December 5, 2001 entitled “Final Notice” as part of a mailing to PSERS members who had not yet filed for Class T-D service as of the date of the mailing. The purpose of the mailing was to remind Claimant once again of his need to provide PSERS with a Membership Class Election Form no later than December 31, 2001, if he intended to change to

Class T-D. (PSERS-1; PSERS-4; PSERS-5; N.T. 26-27). The "Final Notice" stated, in pertinent part, as follows:

As of November 15, 2001, PSERS has not received your response. If you have responded since that date, you may disregard this notice. At the time the legislation passed, most members were in Class T-C. Since then, most members have elected Class T-D membership.

If PSERS does not receive your election form to change to Class T-D, or you elect to remain in Class T-C, you will:

- Continue to contribute to PSERS at your current rate.
- Permanently forfeit your right to elect Class T-D
- Retain the 2% retirement benefit calculation

By electing Class T-D, you will:

- Contribute to PSERS at your current rate until December 31, 2001. Your contribution rate will increase by 1.25% beginning January 1, 2002.
- Increase your retirement benefit multiplier from 2% to 2.5% for all school service and purchased intervening military service. All other non-school service remains at the 2% rate.
- Increase your death benefit.

To make your election, **complete the election form and mail it to PSERS in the return envelope provided.** Your form must be received on or before December 31, 2001, or your termination date, whichever is earlier....

(PSERS-5).

The record unequivocally demonstrates that each of the foregoing notices was mailed to [REDACTED]

[REDACTED] Claimant readily admitted at the hearing that his mailing address on file with PSERS at the time of the mailings was that same address. Claimant further admitted that he continued to reside at that address in October, 2001, and that he returned to that address to retrieve his mail after having moved from the address on an unspecified date.

It is well settled that notice is satisfied when it is mailed to a party's last known address on file with an administering agency even under circumstances where the party to whom the mailing was intended did not personally receive the mailing. *See, Higgins, 736 at 752-753; Tyson, supra; Milford*

Township, 644 A.2d at 219; *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584, 585 (Pa. 1974). It is equally well established that where there is evidence that a document was properly addressed and mailed, such a showing creates a rebuttable presumption that it was delivered to the intended address. See, *Chartiers Industrial*, 645 A.2d at 946; *Sheehan v. Workemen's Compensation Appeal Board*, 600 A.2d 633 (Pa. Cmwlth. 1991); *In re: Cameron Estate*, 130 A.2d 173 (Pa. 1957).

In this case, Claimant's purported entitlement to Class T-D membership is based entirely upon his unsubstantiated assertion that he did not receive any of the notices mailed to him by PSERS at his admitted place of residence prior to December 31, 2001. To the extent Claimant cohabitated with his parents at [REDACTED] PSERS correctly noted that the record supports the inference that Claimant's parents were authorized to accept mail on Claimant's behalf, that they had apparent authority to do so by virtue of Claimant failing to provide PSERS with an alternate address for the mailings, and that Claimant routinely returned to that address to collect the mail his parents had collected for him. See, *Commonwealth v. One 1991 Cadillac Seville*, 853 A.2d 1093, 1096 (Pa. Cmwlth. 2004). Moreover, PSERS established that it would have been notified in the event any of the notices were returned as being undelivered or undeliverable, and that none of the notices mailed to Claimant were, in fact, returned to PSERS.

Against this backdrop, Claimant offered no witnesses or documentation to support his contention that he did not receive the Act 9 PSERS notices. Instead, he asserts that PSERS' misspelling of the last names of his principal beneficiaries on the *Statements of Account* he received after December 31, 2001 somehow demonstrate that PSERS did not mail him the notices prior to that date. Such an inference is without merit, however. In particular, the record shows that Claimant's *Nomination of Beneficiaries* form was handwritten and plausibly set forth the spelling of Mike and Ginger Spinka as Mike and Ginger "Spinica" in that the handwritten "k" within the last names was separated by a space. Assuming,

arguendo, the misspellings were made in error however, such errors were *de minimis* in light of the correct spelling of Claimant's name, correct identification of his mailing address and correct recitation of all other pertinent information in the Statements Claimant subsequently received. For these reasons, the misspellings, even if erroneous, neither support the inference, nor constitute substantive evidence that the notices were not mailed. Having failed to offer any evidence capable of supporting his assertion that PSERS had not provided him any of its Act 9 notices prior to December 31, 2001, Claimant has not rebutted the presumption that the notices were mailed and delivered, as addressed.

PSERS is a creature of statute and derives its authority exclusively from the provisions of the Retirement Code. The language of the Retirement Code at 24 Pa.C.S.A. § 8305.1 is unequivocal in its mandate that Claimant was required to elect Class T-D membership no later than December 31, 2001. The Retirement Code provides no exceptions, and PSERS is constrained to strictly apply the Retirement Code's provisions as they relate to Claimant's Class election. *Forman, supra; Burris, supra; and Bittenbender, supra*. The language set forth in each of the notices sent to Claimant were equally clear as to Claimant's need to request Class T-D membership by December 31, 2001. Because the record clearly demonstrates that Claimant did not elect Class T-D membership within the statutorily required time, and because he failed to rebut the presumption in favor of PSERS that the Act 9 notices were received by Claimant at his address of record, the following Recommendation shall be issued:

RECEIVED

FEB 22 2016


PSERS
EXECUTIVE OFFICE

COMMONWEALTH OF PENNSYLVANIA
PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM

Re: Account of Michael J. Spinka : Docket No. 2015-03
Claim of Michael J. Spinka :

RECOMMENDATION

AND NOW, this 19th day of February, 2016, upon consideration of the foregoing Findings of Fact, Conclusions of Law and Discussion, the Hearing Officer for the Public School Employees' Retirement System recommends that Claimant's appeal from the November 19, 2014 decision of the PSERS' Executive Staff Review Committee be **DENIED**.



Marc A. Moyer, Esquire
Hearing Officer

Claimant:

Michael J. Spinka


For PSERS:

Jennifer A. Mills, Esquire
Public School Employees' Retirement System
5 North Fifth Street
Harrisburg, PA 17101

Sandra Kurtz
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Date of Mailing:

2/19/16